

1
2
3
4
5
6
7
8
9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA
11

12 RAUL ARELLANO, JR.,

13 Plaintiff,

14 v.

15 DR. K. DEAN, et al.,

16 Defendants.
17
18

Case No.: 15-CV-2247 JLS (JLB)

**ORDER: (1) DENYING MOTION TO
RECONSIDER OR APPEAL; (2)
DENYING AS MOOT MOTION FOR
EXTENSION OF TIME; AND (3)
GRANTING EXTENSION OF TIME**

(ECF Nos. 65, 67)

19 Presently before the Court is Plaintiff Raul Arellano, Jr.'s Motion for Extension of
20 Time to File a Reconsideration or an Appeal. (ECF No. 65.) Also before the Court is
21 Plaintiff's Motion to Reconsider or Appeal. ("MTN," ECF No. 67.) On June 22, 2018,
22 Magistrate Judge Jill Burkhardt denied Plaintiff's motion to appoint counsel and extended
23 the time for Plaintiff to file an amended Complaint until July 19, 2018. ("Prior Order,"
24 ECF No. 62.) The Court construes Plaintiff's motion as an objection to Judge Burkhardt's
25 order.

26 Federal Rule of Civil Procedure 72(a) provides that a party may file objections to a
27 magistrate judge's nondispositive order within fourteen days. Plaintiff's objection was
28

1 timely filed with the fourteen-day window¹ and the Court **DENIES AS MOOT** Plaintiff's
2 Motion for Extension of Time, (ECF No. 65).

3 The Court turns to the Plaintiff's objection of Magistrate Judge Burkhardt's order.
4 In her order, Judge Burkhardt denied Plaintiff's request for counsel because "Plaintiff
5 offer[ed] no evidence to the effect that he has a likelihood of success on the merits." (Prior
6 Order 2.) Further, Judge Burkhardt found that "Plaintiff is unable to demonstrate his
7 inability to articulate his claims without the effective assistance of counsel." (*Id.* at 3.)
8 Judge Burkhardt acknowledged that Plaintiff has complained of blurred vision, but noted
9 that "Plaintiff has been able to file appropriate motions and responses, discuss case law
10 with Defendants' attorney, and correspond with the Court and Defendants' counsel." (*Id.*
11 (citing ECF. No. 60 at 2).) And, the prison has afforded Plaintiff several accommodations.
12 (*Id.*) Judge Burkhardt concluded that Plaintiff failed to meet the exceptional circumstances
13 requirement to appoint counsel.

14 Plaintiff generally asserts that if he does not have an attorney appointed then he will
15 be unable to proceed in his case.² (MTN 1.) He objects to Judge Burkhardt's first finding
16 on the grounds that he has survived the initial motion to dismiss stage and thus he has
17 "change to win the case if facts stated are believed by [the] jury." (*Id.* at 2.) Plaintiff
18 maintains that going through discovery without an attorney would be prejudicial because
19 he is blind. (*See id.*) He objects to the Judge Burkhardt's second finding because some of
20 his prior filings were before he lost his vision and that even though he has been able to file
21 with the assistance of other inmates, those inmates cannot assist him with legal research.
22 (*See id.* at 3.) Plaintiff further contends that the accommodations given to him are
23 insufficient because he is blind and cannot utilize them in the first instance. (*See id.* at 4.)
24 He asserts that only an attorney can remedy his inability to conduct legal research to
25

26
27 ¹ Pro se prisoners, proceeding under § 1983, are deemed to have filed when they deliver their filings to
28 prison authorities for forwarding to the clerk. *See Douglas v. Noelle*, 567 F.3d 1103, 1107 (9th Cir. 2009).

² Plaintiff has not personally written the motion; instead, it appears that a fellow inmate is transcribing Plaintiff's words.

1 prosecute his case.

2 Magistrate Judge Burkhardt correctly identified and applied the controlling standard
3 for appointment of counsel. There is no constitutional right to counsel in a civil case.
4 *Lassiter v. Dep't of Social Servs. of Durham Cnty.*, 452 U.S. 18, 25 (1981). While under
5 28 U.S.C. § 1915(e)(1), district courts have some limited discretion to “request” that an
6 attorney represent an indigent civil litigant, *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101,
7 1103 (9th Cir. 2004), *cert. denied sub nom. Gerber v. Agyeman*, 545 U.S. 1128 (2005), this
8 discretion is rarely exercised and only under “exceptional circumstances.” *Id.*; *see also*
9 *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). A finding of exceptional
10 circumstances requires “an evaluation of the likelihood of the plaintiff’s success on the
11 merits and an evaluation of the plaintiff’s ability to articulate his claims ‘in light of the
12 complexity of the legal issues involved.’” *Agyeman*, 390 F.3d at 1103 (quoting *Wilborn v.*
13 *Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)). “Neither of these considerations is
14 dispositive and instead must be viewed together.” *Palmer v. Valdez*, 560 F.3d 965, 970
15 (9th Cir. 2009) (citing *Wilborn*, 789 F.2d at 1331).

16 Here, Judge Burkhardt correctly pointed out that some of Plaintiff’s claims have
17 survived the motion to dismiss stage but have not progressed beyond the motion for
18 summary judgment stage. Thus, the veracity of Plaintiff’s claims have not been tested.
19 Plaintiff cited a few cases to support his argument for appointing counsel. None are
20 applicable. The court in *Gamble v. McDaniel*, No. 15-CV-619-JAD-VCF, 2016 WL
21 3769349, at *3 (D. Nev. July 14, 2016), denied a request for counsel despite alleged injuries
22 to the plaintiff that he had lost vision in his left eye. In *Miller v. Williams*, No. 16-cv-895-
23 MMD-VCF, 2017 U.S. Dist. Lexis 116260, at *2 (D. Nev. July 25, 2017), the district court
24 granted a motion to appoint counsel but did not discuss any of the details of that case to
25 which the Court could compare. Thus, the Court finds Plaintiff has not demonstrated a
26 likelihood of success on the merits.

27 Next, Plaintiff has not demonstrated an inability to articulate his claims in light of
28 the complexity of the legal issues involved. First, the Court does not have any independent,

1 medical verification of Plaintiff's blindness. In May 2018, Defendants submitted two
2 status reports indicating that Plaintiff's treating ophthalmologist has evaluated Plaintiff and
3 has not found a medical reason for Plaintiff's claimed vision problem. (*See* ECF No. 61,
4 at 2; *see also* ECF No. 60, at 3.) Second, Plaintiff has been able to file motions, with the
5 assistance of other prisoners, and has included citations to cases in his motions. Third, his
6 legal claims are not particularly complex. In sum, the Court finds that Judge Burkhardt
7 properly decided Plaintiff's motion.

8 The Court is mindful of Plaintiff's claimed medical issues. It will continue to
9 monitor Plaintiff's medical situation and may request additional briefing from Defendants
10 concerning any further medical diagnosis of Plaintiff's condition. The Court will also
11 consider Plaintiff's further requests to extend time to respond so that he has additional time
12 to read, research, and write. However, Plaintiff's situation does not rise to the "exceptional
13 circumstances" warranting appointment of counsel. The Court **DENIES** his motion to
14 reconsider, (ECF No. 67). Judge Burkhardt granted Plaintiff an extension of time to file
15 an amended complaint to July 19, 2018. Plaintiff requested an extension of time while the
16 Court considered the motion for reconsideration. (MTN 5.)

17 In light of Plaintiff's vision issue, the Court **GRANTS** Plaintiff's request for
18 additional time. Plaintiff **MAY FILE** an amended Complaint on or before September 17,
19 2018. The Court cautions Plaintiff that his amended complaint must be complete in itself
20 without reference to his prior complaint(s) and, to the extent Plaintiff re-alleges claims
21 dismissed with leave to amend, cure the deficiencies identified in this Court's March 12,
22 2018 order, (ECF No. 52). *See* Civil Local Rule 15.1; *Lacey v. Maricopa Cnty.*, 693 F.3d
23 896, 928 (9th Cir. 2012) (en banc) (noting that claims dismissed with leave to amend which
24 are not re-alleged in an amended pleading may be "considered waived if not repled."); *Hal*
25 *Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989)
26 ("[A]n amended pleading supersedes the original.").

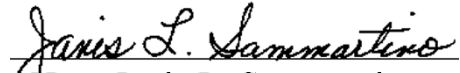
27 ///

28 ///

1 If Plaintiff does not file an amended complaint then the case will proceed as to the claims
2 and Defendants that survived the previous motion to dismiss.

3 **IT IS SO ORDERED.**

4 Dated: August 20, 2018


5 Hon. Janis L. Sammartino
6 United States District Judge
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28